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Nos. 81-2245, 81-2276 and 82-[illegible]

In The

# Supreme Court of the United States

October Term, 1982

STATE OF NEVADA,
*Petitioner,*

vs.

UNITED STATES OF AMERICA, et al.

TRUCKEE-CARSON IRRIGATION DISTRICT,
*Petitioner,*

vs.

UNITED STATES OF AMERICA, et al.,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
*Cross-Petitioner,*

vs.

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.

## MOTION FOR LEAVE TO FILE REPLY TO JOINT POST-ARGUMENT MEMORANDUM AND REPLY TO JOINT POST-ARGUMENT MEMORANDUM FOR THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS

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## MOTION FOR LEAVE TO FILE REPLY TO JOINT POST-ARGUMENT MEMORANDUM

Pursuant to Rule 35.6 of the Supreme Court Rules, the Pyramid Lake Paiute Tribe of Indians (Tribe), cross-petitioner in No. 82-38 and respondent in Nos. 81-22[illegible] and 81-2276, moves for leave to file the annexed Reply to Joint Post-Argument Memorandum.

The other major parties in this case, the United States, Nevada, and the Truckee-Carson Irrigation District

(TCID) have filed or lodged post-argument memoranda. Nevada and TCID availed themselves of the opportunity presented by the government's filing to argue at least two matters that are not responsive to the issues addressed in the government's Memorandum. The Tribe believes that these two matters should not be left unanswered, and, accordingly, seeks leave to file the annexed Reply Memorandum.

Respectfully submitted,

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May, 1983

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## PYRAMID LAKE TRIBE'S REPLY TO JOINT POST-ARGUMENT MEMORANDUM

1. In their Joint Response to the Post-Argument Memorandum for the United States, Nevada and the Truckee-Carson Irrigation District (TCID) argue, as they did in their oral argument to the Court, that a ruling on the res judicata issue in favor of the Tribe and the United States would result in great and irreparable harm to

others. Joint Post-Argument Memorandum at 2, 6. At the same time, they maintain that the Pyramid Lake fishery does not need any more water than it is currently receiving. Neither of these factual claims are supported by the findings of the District Court or the Court of Appeals. *See* Tribe's Res. Br. at 42-43.[1] What is more, the two arguments are incompatible. If Pyramid Lake is receiving sufficient water to satisfy the reservation's fishery purpose, then, by definition, the adjudication of the Tribe's reserved fishery water right will not result in the imposition of any increased burdens on other water users. *Cappaert v. United States*, 426 U. S. 128, 141 (1976).[2]

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[1]The Court of Appeals found that "the Newlands Project is relatively inefficient in its use of water" and that "[i]mprovements in water storage and distribution could result in substantial efficiencies to ameliorate any hardship to TCID." Pet. App. 245a. *See also*, Colorado v. New Mexico, No. 80 Orig. (December 13, 1982), Slip Op. at 4-5 & n. 7, 7-9; Sporhase v. Nebraska, No. 81-613 (July 2, 1982), Slip Op. at 12-13; 128 Cong. Rec. S. 4826 (daily ed. May 11, 1982); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D. C. 1973); Federal Protection of Indian Resources: Hearings before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 92nd Cong. 1st Sess. Part 6 at 1250-59 (1972). But *cf.* United States v. Alpine Land & Reservoir Co., 697 F. 2d 851, 857 (9th Cir. 1983), *petition for cert. pending*, No. 82-1723.

[2]Nevada and TCID persist in distorting the position of the Tribe and the United States. They claim that the assertion of an 1859 priority to an *average* annual inflow of 385,000 acre feet necessarily means that *in dry years* the Lake will receive all of its current *average* annual inflow *plus* half the water now being diverted to the Newlands Project. Joint Post-Argument Memorandum at 2, 3 n. 1. The Tribe and the United States repeatedly have made clear that they are not seeking 385,000 acre feet each and every year and that water to maintain the level of Pyramid Lake is not necessary and would not be sought in dry years. *See, e. g.*, PA 249a; Tribe's Brief in the Court of Appeals

(Continued on next page)

The defendants' factual assertions should not be considered for another reason. This case is here following the district court's order of dismissal on the grounds of res judicata. In isolating the res judicata and collateral estoppel defenses for separate trial, the district court accepted the defendants' contention that "[t]he validity or merit of a cause of action need not be known if the question is whether the cause of action is barred by the principles of res judicata or a party is collaterally estopped from asserting matters in proof of its validity." JA 192. The issue now before the Court is whether the United States and the Tribe are entitled to offer evidence concerning the fishery purpose of the reservation, the amount of water required to satisfy that purpose, and the means by which it can be satisfied with minimal hardship on all water users. *See* Pet. App. 248a-49a. To the extent that these factual matters, which go to the ultimate merits of the action, are deemed relevant and material to the determination of the threshold res judicata issue, the allegations of the complaints of the United States and the Tribe should be accepted as true. *See Hughes v. Rowe*, 449 U. S. 5, 9-10 (1980) (per curiam); *Kugler v. Helfant*,

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at 20-22; Post-Argument Memorandum of the United States at 3 n. 2. Management of the Lake's level and its concentration of dissolved solids or salts depends upon average inflows over the hydrologic cycle; nothing reasonable or even measurable would be gained by insisting on every last drop in dry years. See Tribe Res. Br. at 16 n. 10. No principle of water law known to us mandates that water to satisfy an 1859 priority must be delivered each and every year whether or not it is needed. To the contrary, the United States and the Tribe are entitled to "only that amount of water necessary to fulfill the purpose of the reservation, no more." Cappaert v. United States, 426 U. S. 128, 141 (1976).

421 U. S. 117, 125-26 & n. 5 (1975); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974).

So far as pertinent to the issues at hand, those allegations are: that the Pyramid Lake fishery was, and continues to be, essential to the livelihood, survival and welfare of the Pyramid Lake Tribe and its members, Pet. App. 153a; JA 11;[3] that the level of Pyramid Lake is declining as a result of upstream diversions of Truckee River water, Pet. App. 152a-53a; JA 10-11;[4] that the Lake needs an additional average annual inflow of between 125,000 and 150,000 acre feet in order to replace evaporation losses, *Ibid.*;[5] that the upstream diversions threaten the continued existence of the Lake as a useful body of water, *Ibid.*;[6] that the fishery purpose of the Pyramid Lake Reservation requires sufficient water for the maintenance of the lower reaches of the Truckee River as a natural

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[3]The sale of camping, boating and trout fishing permits to non-Indians is the Tribe's principle source of income, approximately $100,000 annually. See TCID Pet. Br. at 14 n. 9.

[4]There is a typographical error in the last line of Pet. App. 152a; "10" should be "70." See Pet. App. 208a.

[5]It is true, as stated at oral argument, that the current level of Pyramid Lake is approximately the same as it was twenty years ago. That is due primarily to climatic conditions; this has been a period of greater than average precipitation and runoff. The Tribe's concern is what would happen to the Lake in a hydrologic cycle comparable to 1925 to 1967, when its average annual inflow was only 215,000 acre feet and the Lake declined at the rate of approximately 1½ feet per year. See Ex. U-621, reproduced in Tribe's Br. in Opp. to Cert. at 2a; Pet. App. 208a.

[6]If the defendants prevail on the res judicata issue, the Tribe and the United States will be precluded from attempting to prove that Pyramid Lake will be rendered unfit for the trout and the cui-ui unless it receives more water. The necessary research concerning this crucial matter had just begun at the time of the res judicata trial. 13 Tr. 2026-28.

spawning ground for fish, Pet. App. 153a-54a, JA 12;[7] that water in excess of amounts actually needed and decreed are diverted from the River by water users on the Newlands Project as well as by other agricultural and municipal users of Truckee River Water, Pet. App. 158a, JA 16;[8] that if the waters of the Truckee River are used more efficiently there is sufficient water, except in times of extreme

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[7]The cui-ui is almost totally dependent on natural reproduction and is in danger of extinction. Pet. App. 208a-09a; Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp. 704 (D. Nev. 1982), *appeals pending;* 16 U. S. C. § 1532(6); 7 Tr. 933-35. At present, cui-ui cannot be harvested, even for subsistence purposes. 16 U. S. C. § 1532(9), 1538(a)(1)(B). Nevada and TCID have not explained how such an endangered fishery fulfills the reservation's purpose of enabling the Pyramid Lake Paiute Indians to obtain their sustenance from their historic fishery. Pet. App. 183a, 199a.

Hatchery reared Lahontan cutthroat trout have been and are being stocked in Pyramid Lake, but their output has not been adequate to re-establish the Lake at its former level of abundance or even more than a small fraction of it. 14 Tr. 2107-08. Moreover, there is increasing recognition that natural reproduction is essential to the vigor and eventual survival of a species and that sound fisheries management requires both natural recruitment and hatchery propagation. *See* Northwest Power Planning Council, Columbia River Basin Fish and Wildlife Program 7-1 (1982). Hatcheries are particularly important in mitigating the effects of drought. Ex. U-580 at 29; 14 Tr. 2132; 30 Tr. 5806-10; 43 Tr. 8765.

[8]A prime example of the wasteful prevailing practices on the Truckee River is the Nevada law, NRS 704.230, which prohibits the installation of residential water meters in Reno and Sparks and mandates flat rate charges for water. *See* H. R. Doc. No. 181, 84th Cong. 1st Sess. 17 (1955) (pointing out the "lavish" consumption of water in Reno and Sparks owing to the absence of water meters). (Although § 704.230 does not mention Reno and Sparks by name, its terms limit its application to those two cities. Las Vegas and Carson City, Nevada's other urban centers, are metered.)

drought,[9] to meet the reasonable and beneficial needs of adjudicated holders of water rights without further encroachment to the fishery water right claimed by the United States and the Tribe, Pet. App. 158a; and that the rights of the United States and the Tribe are currently being violated by the defendants' upstream diversions, Pet. App. 158a-59a; JA 16.

The defendants moved to bifurcate the trial of this case and to limit the initial trial to res judicata and collateral estoppel. Having made that choice, they now must accept its consequences. Their inconsistent and unsubstantiated claims of imminent catastrophe in the event they lose the res judicata issue and of a thriving fishery even if the Tribe's claim for more water is barred should be seen for what they are, transparent efforts to avoid and to shift attention away from the real res judicata issues. They cannot be allowed to prevent the Tribe from finally being provided an opportunity to prove the substantive allegations of its complaint. If that opportunity is granted, Nevada and TCID will have a chance to prove their contention that the fishery does not need any more water. Hopefully, the District Court, with the help of all the parties, will be able to formulate a solution that minimizes hardships on all water users. Pet. App. 249a; Tribe Res. Br. at 44-45. That tremendously worthwhile effort, so

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[9]Under severe drought conditions, there is not enough water in the Truckee River to meet all existing beneficial uses and decreed rights without any water being devoted to the fishery. The fishery water right claimed in this case would not aggravate that problem, which is common throughout the West, because hatcheries would be the exclusive means of recruitment in those years and there would not be any demand placed on the River for flows to maintain the Lake's level when water is most scarce. See notes 3 and 7, *supra*; Pet. App. 249.

long overdue, will proceed only if the position of the Tribe or the United States is sustained.

2. In their Joint Post-Trial Memorandum (at 5 n. 4) Nevada and TCID seek to explain away the District Court's findings regarding the government's conflict in *Orr Ditch*. A review of the entire letter (JA 339-41) quoted in the District Court's Finding No. 9 (Pet. App. 185a), as well as the prior correspondence to which it responded, JA 321-38, leaves no doubt that the actual and perceived conflict was between the water needs of the fishery and the Reclamation Service's transbasin diversion to the Newlands Project not, as suggested at the argument, between the fishery and irrigation on the Reservation.[10] Nor is there any indication anywhere in the voluminous record that the fishery water right was not asserted in *Orr Ditch* because anyone questioned the fishery purpose of the Pyramid Lake Reservation, or because of the alleged primacy of Indian agriculture over fishing, or because of any perceived conflict between the water needs of the fishery and the relatively small amount of water required for the Indians' agriculture. *See* Pet. App. 219a-22a & n. 9 (finding no intent to extinguish the Reservation's fishery purpose in favor of agriculture in the 1904 Pyramid Lake Amendment to the 1902 Reclamation Act, which was never implemented in any event, and distin-

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[10]*See, e. g.*, JA 323 ("[T]his water [for the fishery] is necessary largely at times when it is not needed for irrigation purposes . . . but the flow of the [Truckee] river is now diverted from its natural bed and carried over to the Lahonton Basin, where it is not stored but passes through a government owned power plant at about 150 second feet, which would be amply sufficient to enable the fish to ascend the River.")

guishing the very different post-1900 history of the Walker River Indian Reservation).

Nevada and TCID also conveniently ignore the underlying basis of the District Court's decision. Placing "primary reliance" (Pet. App. 161a) on the 1902 Reclamation Act, the District Court held that the actions and inaction of the Secretary of the Interior under the purported authority of that Act resulted in the extinguishment of the Tribe's fishery water right. Pet. App. 161a-67a, 189a, 211a-22a. This holding is inexplicable under the rationale offered by Nevada and TCID. It makes sense only if the government's refusal to assert the fishery water right was directly related to the "foreseeable," "apparent" and "squarely presented" conflict between the water requirements of the Newlands Project and of the Pyramid Lake fishery. *See* Pet. App. 165a, 189a.

## CONCLUSION

Nevada and TCID are attempting to obfuscate the real issues in this case by relying on false and unsubstantiated factual allegations and on manifestly erroneous "interpretations" of the lower courts' findings. These distortions should be ignored. This case must be decided on the basis of the application of well-established principles of res judicata to the unchallenged facts found by the lower courts.

Respectfully submitted,

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